STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 17, 2012
v	No. 302471 Marquette Circuit Court
SURANIT IMSUMRAN, Defendant-Appellant.	LC No. 10-047780-FC

Before: MARKEY, P.J., and BECKERING and M. J. KELLY, JJ.

PER CURIAM.

Defendant Suranit Imsumran appeals as of right his convictions for assault with intent to commit great bodily harm less than murder, MCL 750.84; first-degree home invasion, MCL 750.110a(2); and assault with intent to commit sexual penetration, MCL 750.520g(1). The trial court sentenced defendant to 6 to 20 years' imprisonment for the home invasion and to 329 days' imprisonment for each of the assault convictions, with credit for 329 days. We affirm.

I. FACTS

Defendant and the victim were co-workers at a restaurant. Defendant and the victim socialized outside of work; however, they characterized their relationship differently. Defendant felt that they had a romantic relationship, but the victim felt that they were only friends. Defendant had visited the victim at her apartment and later copied her key without her knowledge. On the night of the incident, defendant and the victim argued at the restaurant. After work, defendant went out drinking, and the victim picked up her one-year-old daughter and returned to her home.

At about 2:00 a.m., defendant went to Wal-Mart and purchased rope, duct tape, scissors, cable ties, and personal lubricant. Defendant drove to the victim's apartment and entered her building with the key that he copied. Defendant was wearing a ski mask and had, in addition to the items that he purchased at Wal-Mart, a flashlight and folding knife. The victim awoke to defendant standing over her with the flashlight. Defendant jumped on top of the victim and began choking her. Defendant told the victim, "shut up or you die" and repeatedly said, "You die. You die." Defendant produced his knife and held it to the victim's neck while repeating that she had to die. Defendant attempted to tape the victim's mouth shut with duct tape, grabbed the victim's breast, and attempted to take out his penis.

The victim took the knife away from defendant and stabbed defendant twice: once in the leg and again in the left side of his abdomen. The victim pushed defendant off of her and ran into her apartment building's hallway. Realizing that her baby was still in the apartment, the victim went back into the apartment when defendant did not follow. When she returned, defendant had retrieved the knife and was cutting the power cord to her telephone. The victim jumped on defendant to try to get the knife away from him. The victim eventually reclaimed the knife and forced defendant out of the apartment.

Later that morning, defendant returned to Wal-Mart. He was not wearing shoes, and his pants were covered in blood. Defendant purchased bandages, peroxide, and shoes, using blood stained money. The police apprehended defendant in the Wal-Mart parking lot.

II. ANALYSIS

Defendant appeals the trial court's scoring of offense variables (OV) 7, 9, and 12. "The sentencing court has discretion in determining the number of points to be scored provided that there is evidence on the record that adequately supports a particular score." *People v Waclawski*, 286 Mich App 634, 680, 780 NW2d 321 (2009). Therefore, "this Court reviews the scoring to determine whether the sentencing court properly exercised its discretion and whether the evidence adequately supported a particular score." *Id.* "Scoring decisions for which there is any evidence in support will be upheld." *People v Endres*, 269 Mich App 414, 417; 711 NW2d 398 (2006). An erroneous score requires resentencing if its correction would result in a different minimum guidelines range. *People v Francisco*, 474 Mich 82, 89 n 8, 711 NW2d 44 (2006).

A. OV 7

Defendant argues that the trial court erred in scoring 50 points for OV 7, MCL 777.37. OV 7 permits a score of 50 points when "[a] victim was treated with sadism, torture, or excessive brutality or conduct designed to substantially increase the fear and anxiety a victim suffered during the offense." MCL 777.37(1)(a). The trial court found that defendant treated the victim with "conduct designed to substantially increase the fear and anxiety [that she] suffered during the offense." Specifically, it found that "the presence of a knife and being in a ski mask was intended to substantially increase fear" in the victim. Moreover, the court noted that defendant threatened the victim with the knife and uttered the words "you must die."

Recently, in *People v Glenn*, ___Mich App___; ___NW2d___ (2012), slip op at 3, we opined that conduct is designed to substantially increase the fear and anxiety that a victim suffers during an offense if "the conduct was designed to cause copious or plentiful amounts of additional fear." "OV 7 is designed to respond to particularly heinous instances, in which the criminal acts to increase [the] fear [that is inherent in a crime against a person] by a substantial or considerable amount." *Glenn*, slip op at 4. "Circumstances inherently present in the crime must be discounted for purposes of scoring an OV." *Id.*

Defendant argues that the trial court erroneously scored 50 points for OV 7 because (1) the presence of the knife should be discounted because it was an element of the sentencing offense of home invasion and (2) defendant's conduct was not designed to increase fear and anxiety but, rather, was to get the victim to speak to him. We do not agree.

To be convicted of first-degree home invasion, either the defendant must be "armed with a dangerous weapon" or there must be "[a]nother person lawfully present in the dwelling" while the defendant "is entering, present in, or exiting the dwelling." MCL 750.110(2)(a)-(b). Furthermore, the defendant must either intend to commit a felony, larceny, or assault while entering the dwelling or actually commit a felony, larceny, or assault while entering, present in, or exiting the dwelling. See *id.* Thus, while the presence of a dangerous weapon may be inherent in the crime of first-degree home invasion, the *use* of a dangerous weapon is not. See *id.* Therefore, when scoring OV 7 for first-degree home invasion, it was not appropriate to discount defendant's *use* of the knife when assaulting the victim. See *Glenn*, slip op at 4.

We conclude that defendant's conduct during the incident supported the trial court's finding that he treated the victim with conduct designed to substantially increase her fear and anxiety during the home invasion. In *People v Hornsby*, 251 Mich App 462, 468-469, 650 NW2d 700 (2002), an armed robbery case, we upheld the trial court's scoring of 50 points for OV 7. The victim in *Hornsby* testified that the defendant held her at gunpoint while forcing her to get money out of the store's safe. *Id.* The defendant repeatedly threatened to kill her and other employees in the store, displayed a gun throughout the entire encounter, and at one point cocked the gun. *Id.* We found that the defendant "did more than simply produce a weapon and demand money." *Id.* at 469. The "[d]efendant's actions in cocking the weapon and repeatedly threatening the life of the shift supervisor and the other employees supported the court's finding that he deliberately engaged in 'conduct designed to substantially increase the fear and anxiety a victim suffers during the offense.'" *Id.* (citation omitted).

Similar to how the defendant in *Hornsby* "did more than simply produce a weapon and demand money" during an armed robbery, defendant in the present case did much more than simply arm himself with a knife while committing a home invasion. When the victim awoke to see defendant standing over her, defendant began choking her. He then held a knife to her throat. The victim had to use both hands to keep the knife a "safe distance" from her neck. Defendant covered the victim's mouth while saying "shut up or you die." Defendant repeatedly said, "You die. You die." The victim testified that defendant was "[r]epeating like different ways, like, 'Shut up or you die.' Just plain out 'you die.'" She further testified that defendant stated that she would surely "tell on him" and that therefore "you must die." Defendant made these threats on the victim's life while he was on top her with a knife and ski mask. Defendant attempted to tape the victim's mouth closed. Defendant grabbed the victim's breast and attempted to take out his penis. Accordingly, we do not agree with defendant's contention that his conduct was only designed to get the victim to speak with him. Indeed, defendant specifically told Officer Christopher Aldrich that he wanted to "scare" the victim. The record evidence supports the trial court's scoring of 50 points for conduct designed to substantially increase the victim's fear and anxiety.

B. REMAINING SCORING CHALLENGES

Defendant also argues that the trial court erroneously scored 10 points under OV 9, MCL 777.39, and 5 points under OV 12, MCL 777.42. Defendant's minimum guidelines range under MCL 777.63 was 57 to 95 months (prior record variable level C and OV level VI). To be entitled to resentencing on the basis of an erroneous OV score, an error in OV scoring would have to reduce defendant's total OV score of 105 points to 74 points. See MCL 777.63;

Francisco, 474 Mich at 89 n 8. Even if the trial court had scored OV 9 at zero points and OV 12 at one point as defendant requests, a reduction of 14 points would not reduce defendant's total OV score of 105 points to 74 points. Accordingly, we decline to review these remaining scoring challenges because resentencing would not be required even if defendant were to prevail on both challenges. See *Francisco*, 474 Mich at 89 n 8.

Finally, defendant argues that his counsel was ineffective for failing to object at sentencing regarding the scoring of OV 12. We conclude that defendant has abandoned this issue by failing to raise it in his statement of questions presented. See *People v Unger*, 278 Mich App 210, 262; 749 NW2d 272 (2008). But, notwithstanding defendant's abandonment of this issue, we conclude that defendant's ineffective-assistance-of-counsel claim fails because he cannot establish a reasonable probability that, but for counsel's failure to object to the scoring of OV 12, the result of the proceeding would have been different. See *People v Dendel*, 481 Mich 114, 124-125; 748 NW2d 859 (2008). As discussed above, resentencing would not be required even if one point were scored under OV 12 as defendant requests.

Affirmed.

/s/ Jane E. Markey
/s/ Jane M. Beckering
/s/ Michael J. Kelly